



Date: AUGUST 18, 1999

Case No. 1997-INA-418

In the Matter of:

**BAGEL BISTRO INC.,**  
Employer,

On behalf of:

**ANTONIO HUERTA,**  
Alien.

Certifying Officer: Dolores DeHaan  
New York, NY

Appearance: Frank Mazzocchi, Esq.

Before: Holmes, Lawson and Wood  
Administrative Law Judges

JAMES W. LAWSON  
Administrative Law Judge

## DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.<sup>1</sup> After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination (FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.<sup>2</sup>

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

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Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

## **THE PROCEEDINGS**

Employer seeks to fill the position of Cook/Baker with DOT Title Cook, Specialty, Foreign Food, DOT # 313.361-030, a wage offer of \$10.95 per hour, job duties of :

Cooking of all foods on menu including Mexican foods, such as Tostadas, Flautas and enchiladas all baking of muffins, apple turnovers, croussaints, cookies and 12 varieties (sic) of bagels.

and job requirements of two years of experience in the job offered.

The Notice of Findings proposed to deny labor certification on the basis that the position description involved a combination of duties consistent with those of a Bagel Baker and Cook. (AF 47) The CO stated that the duties are not normally combined and employer must document that the combination of duties arose from business necessity or amend the job duties. (AF 47) The CO further stated that employer's letter of May 8, 1996, establishing the business necessity for requiring the combination of duties was unacceptable. (AF 47) In addition, the CO noted that since employer's menu consisted mostly of deli foods with only a few Mexican dishes, there was an attempt by employer to limit the pool of U.S. applicants. (AF 47) The CO instructed employer that it could rebut the findings by: (1) establishing that all other employees both past and present had the combined skills and that the combination of skills was a condition of hire; (2) documenting how employers of like size and type handled these duties; (3) establishing that no other employees can do one or more of the duties; (4) showing that its requirements for the position are not unduly restrictive; or (5) amending the job duties and readvertising. (AF 47)

The employer contended that in the past, it customarily employed individuals who have the combined qualifications of bagel maker and cook. (AF 45) Employer further stated that

bagels are prepared in the mornings and other foods are prepared later in the day for customers or for catering needs. Employer maintained that other similar establishments also employed individuals with the same combination of duties. Also, given the size of the business, employer argues that it would be “impractical and financially difficult... to hire two individuals for the position of bagel baker and cook.” (AF 45) Employer stated that there is no other employee that is able to perform all of the duties and based on past hiring practices the requirements for each position are not unduly restrictive. (AF 45)

The FD denied labor certification for the employer’s failure to document the business necessity for requiring a combination of duties. (AF 50) The CO noted that employer claimed a business need for the combination of duties, but failed to submit any documentation establishing the business necessity for such requirements. The CO further determined that mere statements from the employer were not sufficient enough to rebut the findings and that employer provided no specifics to support its statements. (AF 49)

### **CONTENTIONS ON APPEAL**

On appeal, employer contends that the combination of duties is a business necessity. Employer argues that given the small size and the nature of its business, it would be economically infeasible and impractical to hire two workers to perform the duties of the job. Employer stated further that it has employed individuals in the past who performed the same combined duties. Employer also argued that a previous alien employee was certified as a cook/baker under exactly the same factual situation as here. Employer maintains that since its previous applicant, the circumstances establishing business necessity have not changed with the exception that another cook/baker is required for the business.

### **DISCUSSION**

The FD correctly concluded that employer failed to document the necessity for the combination of duties, as required by 20 CFR Section 656.21(b)(2). Employer has made its own written statements, but has failed to provide any documentation to substantiate its claims. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof. *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989). If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer’s failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991).

Here the NOF requested documentation, but the employer responded with a bare statement by the employer as to its practices and opinion as to industry practice without any

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substantiating documentation. (AF 45) Also it is noted that employer has submitted with its brief in support of appeal a copy of a certification of a different alien as a “Cook, Specialty, Foreign Food” in another case involving the same employer. In the first place, it is noted that evidence first submitted with the request for review will not be considered by the Board. *Capriccio’s Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991). Moreover, it is noted that each case is independently considered and the mere fact of the previous certification of an alien for a similar or identical position does not warrant certification herein. To the contrary, it might impose a greater burden to show a need for an additional position.

Accordingly, the following order will enter.

### **ORDER**

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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JAMES W. LAWSON  
Administrative Law Judge

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**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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